

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GLENN C. MCFARLAND,

Plaintiff,

v.

SEARS HOLDINGS MANAGEMENT,
et al.,

Defendants.

No. C 11-4587 PJH

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Defendant's motion for summary judgment came on for hearing before this court on February 27, 2013. Plaintiff appeared by his counsel Richard Rogers, and defendant appeared by its counsel Alden J. Parker. Having read the parties' papers (including the supplemental declarations filed after the hearing), and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion.

BACKGROUND

This is an age discrimination case, asserting claims under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, et seq., and the California Fair Employment and Housing Act ("FEHA"), Cal. Govt. Code § 12940(a).

Plaintiff Glenn McFarland was originally hired by defendant Orchard Supply Hardware Stores Corporation ("OSH") when he was over 70 years of age. He began working for OSH in June 2003 as a sales associate at the store at Mountain View, California. In 2006, he became the Electrical Department Lead (department supervisor).

During at least the latter part of plaintiff's time as a department lead, he was

1 supervised, directly and indirectly, by three assistant managers – Rick Himan (“Himan”),
2 Daryl Hirohama (“Hirohama”), and Richard Chow. Each assistant manager, in turn,
3 reported to the store manager, Steven Hill (“Hill”).

4 The Mountain View store was and remains one of the OSH’s highest-volume stores,
5 consistently ranking as one of the five top stores in terms of sales. The 2008 year-to-date
6 sales ranking for the Electrical Department at the Mountain View store was number three
7 (out of 84 stores). In January 2009, plaintiff received an award for “Employee of the
8 Month.”

9 Also in January 2009, OSH conducted a labor hour review of all stores in order to
10 address staffing needs given the then-current state of the economy. According to Jay Keith
11 (“Keith”), who was OSH’s director of Human Resources (“HR”) at the time of plaintiff’s
12 employment, OSH concluded, based on the labor review, that management and
13 department lead staffing needed to be adjusted, and that to accomplish this, a reduction-in-
14 force (“RIF”) would be necessary. Based on the sales volume, OSH determined that the
15 Mountain View store was overstaffed by two department lead positions and one assistant
16 manager position.

17 In order to implement the RIF, OSH sent a memo to all store managers in February
18 2009 requesting that they review and rank each of their department leads and assistant
19 managers, based on current and past performance and OSH’s organizational values. The
20 store managers were informed that the evaluations were to be used to identify performance
21 problems, but were not told that rankings would be used in connection with a RIF. Hill
22 states in his declaration that he had no idea that there would be a RIF, and believed that
23 each store manager was calibrating his team. Himan and Hirohama also state that they
24 were unaware that a RIF would be conducted.

25 As instructed by HR, Hill reviewed the performance ratings of his eleven department
26 leads, and rated the leads based on “Organizational Behavior Ratings,” “Performance
27 Indicator Ratings,” and past performance reviews. Hill claims that prior to completing the
28 rankings, he had not been informed that OSH had concluded that the Mountain View store

1 was overstaffed by two department leads. He evaluated plaintiff's past and current
2 performance and spoke with the store's assistant managers to get their evaluation of
3 plaintiff's performance.

4 Both Himan and Hirohama state in their declarations that they considered plaintiff to
5 be a low-performing department lead in comparison to his peers, and that they
6 communicated this to Hill. Hill finally determined that in comparison to the other leads,
7 plaintiff was low-performing, and in fact was the second-lowest rated out of the eleven
8 department leads. Of those ranked higher than plaintiff, a majority were significantly over
9 the age of 40.

10 Following his evaluation, Hill's rankings were forwarded to HR. HR (specifically,
11 Keith) reviewed Hill's submission and found his assessment to be fair and accurate.
12 Subsequently, HR informed Hill that due to the current economic and retail conditions, OSH
13 would be conducting a statewide RIF and that he would be required to terminate his two
14 lowest-ranking department leads and his lowest-ranking assistant manager. Accordingly,
15 Hill terminated plaintiff's employment in February 2009 pursuant to the statewide RIF.

16 On April 9, 2009, plaintiff filed an administrative charge of discrimination with the
17 Equal Employment Opportunity Commission ("EEOC"). He also filed a charge with the
18 California Department of Fair Employment and Housing ("DFEH"). In the EEOC charge, he
19 alleged that OSH had laid him off on February 26, 2009, and that "[n]o reasons as to why I
20 was being selected for layoff were given to me." He asserted that he believed he had been
21 discriminated against because of his age.

22 The EEOC issued a Letter of Determination on June 1, 2011, finding that OSH had
23 discriminated against plaintiff because of his age. Nevertheless, the EEOC did not opt to
24 file suit on plaintiff's behalf. Instead, the EEOC issued a right-to sue letter dated
25 September 13, 2011.

26 Plaintiff filed this action on September 15, 2011, against OSH and its parent
27 company, Sears Holdings Management Corporation ("Sears Holdings"), alleging three
28 causes of action – a claim of discrimination under the ADEA, a claim of discrimination

1 under FEHA, and a claim of failure to take reasonable steps to prevent age discrimination
2 from occurring, also under FEHA. On May 8, 2012, pursuant to stipulation, Sears Holdings
3 was dismissed from the case.

4 Defendant OSH now seeks summary judgment as to the ADEA and FEHA
5 discrimination claims.

6 DISCUSSION

7 A. Legal Standard

8 A party may move for summary judgment on a “claim or defense” or “part of . . . a
9 claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there is
10 no genuine dispute as to any material fact and the moving party is entitled to judgment as a
11 matter of law. Id.

12 A party seeking summary judgment bears the initial burden of informing the court of
13 the basis for its motion, and of identifying those portions of the pleadings and discovery
14 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp.
15 v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome
16 of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a
17 material fact is “genuine” if there is sufficient evidence for a reasonable jury to return a
18 verdict for the nonmoving party. Id.

19 Where the moving party will have the burden of proof at trial, it must affirmatively
20 demonstrate that no reasonable trier of fact could find other than for the moving party.
21 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue where
22 the nonmoving party will bear the burden of proof at trial, the moving party can prevail
23 merely by pointing out to the district court that there is an absence of evidence to support
24 the nonmoving party's case. Celotex, 477 U.S. at 324-25. If the moving party meets its
25 initial burden, the opposing party must then set out specific facts showing a genuine issue
26 for trial in order to defeat the motion. Anderson, 477 U.S. at 250; see also Fed. R. Civ. P.
27 56(c), (e).

28 B. Defendant's Motion

OSH argues that summary judgment must be granted as to both the ADEA and the FEHA discrimination claims. The ADEA imposes liability for discrimination “because of such individual’s age.” 29 U.S.C. § 623(a)(1); see Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175-77 (2009) (plaintiff must prove that his age was “but-for” cause of employer’s decision to terminate him, not merely one of several reasons for the action). FEHA prohibits employers from discharging or dismissing any employee over 40 years old based on the employee’s age. Cal. Gov’t Code §§ 12926(b), 12940(a); see Harris v. City of Santa Monica, 56 Cal. 4th 203, 232 (2013) (plaintiff must prove that age discrimination was “substantial factor” in employment decision).

A disparate treatment claim must be supported by direct evidence of discrimination, or may instead be evaluated under the burden-of-proof-and production analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Shelley v. Geren, 666 F.3d 599, 607 (9th Cir. 2012) (“nothing in Gross overruled our cases utilizing [the McDonnell Douglas] framework to decide summary judgment motions in ADEA cases”).¹

Because state and federal laws are similar, California courts look to federal precedent when interpreting FEHA. Guz v. Bechtel Nat’l, Inc., 24 Cal. 4th 317, 354 (2000). In particular, courts use the McDonnell Douglas burden-shifting framework and other federal employment law principles when analyzing disparate-treatment claims under FEHA. See Schechner v. KPIX-TV, 686 F.3d 1018, 1023 (9th Cir. 2012); Earl v. Nielsen Media Res., Inc., 658 F.3d 1108, 1112 (9th Cir. 2011).

Here, plaintiff has presented no direct evidence of disparate treatment. Thus, under the McDonnell Douglas analysis, he can survive summary judgment on his claims only if he first provides sufficient evidence to establish a prima facie case of discrimination. If he succeeds, the burden shifts to OSH to produce evidence of a legitimate, nondiscriminatory reason for the adverse action. If OSH successfully carries that burden, the ultimate burden shifts to plaintiff to raise a triable issue of material fact as to whether the proffered reasons

¹ It is only at trial that a plaintiff alleging an ADEA claim is required to prove that age was the “but-for” cause of his termination. Id. at 608.

1 for the adverse action are a mere pretext for unlawful discrimination. See Shelley, 666
2 F.3d at 607-08. Notwithstanding the burden-shifting, the ultimate burden of proof remains
3 with plaintiff to show that OSH intentionally discriminated against him because of his age.
4 Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000).

5 Here, OSH argues that the court should grant summary judgment because plaintiff
6 cannot establish a prima facie case of age discrimination, and that even if he could, he
7 cannot establish a triable issue with regard to whether OSH's articulated reason for the
8 layoff was pretextual.

9 To establish a prima facie case of age discrimination, plaintiff must offer either direct
10 or indirect evidence that gives rise to an inference of unlawful discrimination. Nidds v.
11 Schindler Elevator Corp., 113 F.3d 912, 917 (9th Cir. 1996). To establish a prima facie
12 case through circumstantial evidence, he must show that he was a member of the
13 protected class (40 years of age or older); that he suffered an adverse employment action;
14 that at the time of the adverse action he was satisfactorily performing his job; and that he
15 was replaced in that position by a significantly younger person with equal or inferior
16 qualifications, or discharged under circumstances otherwise giving rise to an inference of
17 age discrimination. See Diaz v. Eagle Produce, Ltd. Partnership, 521 F.3d 1201, 1207 (9th
18 Cir. 2008); see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000);
19 Pottenger v. Potlach Corp., 329 F.3d 740, 745-46 (9th Cir. 2003).

20 Here, there is no dispute that plaintiff was over the age of 40, and that he was
21 terminated pursuant to the RIF. OSH argues, however, that plaintiff cannot establish a
22 prima facie case because he cannot show that he was satisfactorily performing his job and
23 meeting OSH's legitimate expectations at the time he was terminated, and cannot establish
24 that he was replaced by a significantly younger person with equal or inferior qualifications.

25 With regard to job performance, OSH argues that the evidence shows that on
26 numerous occasions, plaintiff provided inappropriate or rude responses to customers
27 asking for his help. For example, OSH provides a declaration by Hill, who states that on
28 one occasion, he heard a customer ask plaintiff where a certain item could be found, and

1 plaintiff responded in a rude and inappropriate manner; and a declaration by Plumbing
2 Department Lead Michael Ruiz ("Ruiz"), who states that he witnessed plaintiff becoming
3 frustrated and upset with a customer, and cursing at the customer.

4 OSH also points to a December 2007 "Documentation of Performance Issues,"
5 which was signed by plaintiff. This document notes that plaintiff put his fingers in two
6 customers' faces, swore at them, and then walked away after they asked for his
7 assistance. In September 2008, plaintiff received (and signed) another "Documentation of
8 Performance Issues," also for providing poor customer service, this time to one of OSH's
9 secret shoppers.

10 Hill, Himan, and Hirohama state in their declarations that as a result of customer
11 complaints, written warnings, and improper behavior, plaintiff's supervisors believed plaintiff
12 could be "short" with customers, and did not meet their expectations or the expectations of
13 OSH with regard to providing proper customer service.

14 Hill also believed that plaintiff had problems in the area of leadership, as he had
15 conflicts with co-workers, including the associates he supervised in the electrical
16 department. Hill states that on multiple occasions, he found it necessary to have
17 discussions with plaintiff and his subordinates to resolve conflicts among them. In addition,
18 Hill asserts, plaintiff spent a lot of time "organizing" things and typing up lists, when he
19 needed to be more "hands on."

20 Plaintiff disagrees with the assessment of Hill and the assistant managers regarding
21 his job performance.

22 Plaintiff argues that his job performance was "excellent." This argument is based
23 primarily on deposition testimony from employees Paula Allen ("Allen") and James
24 McDougall ("McDougall"), whose work he supervised, to the effect that he was a hard
25 worker, treated his subordinates fairly, and was polite and friendly with customers; on
26 plaintiff's receipt of the "Employee of the Month" award in January 2009; and on the fact
27 that the Electrical Department at the Mountain View store was ranked third in sales among
28 all OSH stores in 2008.

1 With regard to the “Employee of the Month” award, plaintiff contends that the award
2 is given for “exceptional” performance, and that he was an “excellent” employee. Based on
3 this evidence, plaintiff contends that the question whether his work performance was
4 satisfactory is disputed.

5 Hill states, however, that there are various reasons that a particular employee might
6 be named “Employee of the Month.” In this case, Hill claims he decided that plaintiff should
7 receive the award because Hill had been working with him to improve his performance, and
8 his performance had in fact improved during the previous month. Although plaintiff was not
9 a top performer, Hill says he wanted to encourage him to continue working to improve.

10 Plaintiff disputes this account, arguing in his opposition that the fact that he received
11 this award means that his performance was “excellent,” and that OSH would never give an
12 employee the “Employee of the Month” award just to encourage the employee to work
13 harder (and that he had never heard of an employee being given the award because he or
14 she needed encouragement).

15 Plaintiff also provides deposition testimony from Bruce Haynes (“Haynes”), a former
16 Field Human Resources Director, who plaintiff claims testified that the award was a reward
17 for exceptional performance. In actuality, Haynes described the “Employee of the Month”
18 program as a program

19 where the management team or sometimes staff would indicate who they felt
20 in the store kind of went above and beyond the call of duty in regards to
21 customer service or other criteria within the store, and they would nominate,
and typically the management team or store manager would then select the
person as employee of the month.

22 Haynes added that the nomination process “really did vary from store to store.” The only
23 written guideline was “a poster in each store that explained the employee of the month and
24 kind of the criteria around that.” Nowhere in the attached deposition excerpts did Haynes
25 state that the award was solely for – or a reward for – “exceptional performance.”

26 Moreover, during his February 12, 2013 deposition, which was taken after plaintiff
27 filed his opposition to OSH’s motion, plaintiff testified that he would rate his job
28 performance as either “good” or “very good” – not “excellent.” He also conceded that he

1 had no idea what criteria were evaluated to determine which employee would be named
2 “Employee of the Month,” and that he had simply “assumed” that the award was given for
3 “exceptional performance and attitude.”

4 With regard to the sales ranking of the Electrical Department at the Mountain View
5 store, while plaintiff concedes that the performance of a particular department cannot be
6 attributed to the efforts of one employee, he again cites to the testimony of Allen and
7 McDougall to the effect that he was an excellent supervisor, was very knowledgeable, and
8 provided good customer service. He also claims that in his work evaluations, he was
9 praised for his service to customers.

10 Hill contends, however, that the ranking of the Electrical Department at the Mountain
11 View store was significantly impacted by the large commercial sales business (bulk orders
12 from contractors) at that particular store, which in Hill’s view was unconnected to plaintiff’s
13 abilities as a department head. During the period of plaintiff’s employment, commercial
14 sales were managed by the Commercial Services Lead, Dale Arends (“Arends”).

15 Hill explains that most of the commercial sales came from contractors placing bulk
16 orders for electrical and tool products, but those sales were still attributed to those
17 respective departments for purposes of department sales rankings (although the Electrical
18 and Tool Department Leads were not involved in the management or handling of those
19 commercial sales). Thus, OSH contends, while it might appear on the face of it that
20 plaintiff’s department was one of the top performing departments in terms of sales, the
21 commercial sales of electrical products significantly contributed to this sales ranking.

22 In his declaration, plaintiff disputed Hill’s suggestion that he (plaintiff) was not
23 responsible for the large volume of commercial sales. Plaintiff asserted that contractors
24 came to his department “because of our knowledge of the product, our excellent service,
25 and because I made certain that we kept enough product on hand.” He then added that
26 “[a]fter we had serviced the contractor, we directed him or her to commercial sales” and
27 that he and the employees he supervised “managed and handled everything but the
28 check-out.”

1 Nevertheless, in his February 12, 2013 deposition testimony, plaintiff conceded that
2 he had no knowledge of why any particular contractor came to the electrical department at
3 the Mountain View store, and also testified that it was not true that every contractor that
4 came to the electrical department was completely serviced by electrical department
5 employees and then went to check out – i.e., that he and the employees he supervised
6 managed and handled everything but the check-out procedures.

7 In addition, McDougal, whom plaintiff supervised, testified in his deposition that he
8 did not recall the Electrical Department making any commercial sales, and indicated that
9 the Commercial Department handled commercial sales entirely. Moreover, both Hill and
10 Kevin Twomey (“Twomey” – another store manager) testified in their depositions that
11 commercial sales are handled directly through commercial services (not another
12 department). As for plaintiff’s suggestion that the success of the Electrical Department was
13 due solely to his efforts, both Hill and Twomey testified that the sales increase was affected
14 by the overall increase in the general economy, and that the sales success of a department
15 cannot be attributed to a single individual.

16 The fourth element of the prima facie case requires plaintiff to show that he was
17 replaced by a significantly younger person with equal or inferior qualifications, or that he
18 was discharged under circumstances otherwise giving rise to an inference of age
19 discrimination. In general, an inference of discrimination can be established by “showing
20 that others not in [plaintiff’s] protected class were treated more favorably.” Diaz, 521 F.3d
21 at 1207. Where the discharge arises from a RIF, a reasonable inference of age
22 discrimination can arise where the employer had a continuing need for the discharged
23 employee’s services in that the discharged employee’s duties were still being performed, or
24 where others not in the protected class were treated more favorably. Coleman, 232 F.3d at
25 1281.

26 OSH argues that plaintiff cannot meet the fourth element of the prima facie case
27 because he cannot show that he was replaced by significantly younger person with equal
28 or inferior qualifications. OSH contends that the evidence shows that the Electrical

1 Department Lead position remained vacant for a few months, then was filled by Arends,
2 who was 59 years old at the time, and when Arends retired, by Don McElravy (“McElravy”),
3 who was 63 years old at the time. OSH notes that while both Arends and McElravy were
4 younger than plaintiff (76 at the time of the termination), both were well past the age of 40.

5 Moreover, OSH notes, both Arends and McElravy had qualifications and experience
6 that equaled or exceeded plaintiff’s. Arends was the former Commercial Department Lead,
7 and had worked with numerous plumbers and contractors to obtain bulk order items,
8 including electrical items. He had the same number of years of experience as a
9 department lead as plaintiff did. Arends’ 2008 and 2007 performance review scores were
10 each 3.6, and Hill ranked Arends fifth out of eleven department leads. McElravy had
11 approximately seven years’ experience as a department lead. His 2008 performance
12 review score was 3.65, and his 2007 score was 3.5. Hill ranked McElravy third out of
13 eleven department leads. By contrast, plaintiff’s performance review score from June of
14 2007 through May of 2008 was 3.0.

15 In response, plaintiff argues that the person who “replaced” him was substantially
16 younger than 77. And in any event, he asserts, this is not the appropriate measure in a RIF
17 case. Hill prepared a spreadsheet ranking of all the leads, and laid off the bottom two.
18 Plaintiff contends that the appropriate comparison is not between himself and the person
19 who replaced him, but a comparison of the ages of all the other leads – most of whom were
20 substantially younger than plaintiff (who was the oldest lead).

21 Plaintiff asserts that in Coleman, the Ninth Circuit held that in a RIF case, the plaintiff
22 need not show that he was replaced by a substantially younger employee, and that it is
23 enough that the discharge occurred under circumstances giving rise to an inference of
24 discrimination. Here, he argues, the Electrical Department that he supervised was doing
25 very well, and he had just been honored as “Employee of the Month.” And moreover, he
26 was not offered another position. He claims that these facts are sufficient to create an
27 inference of age discrimination.

28 The Ninth Circuit has repeatedly noted that “[t]he burden of establishing a prima

1 facie case of disparate treatment is not onerous.” See, e.g., Lyons v. England, 307 F.3d
2 1092, 1112 (9th Cir. 2002) (quoting Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248,
3 253 (1981)). On summary judgment, the degree of proof necessary to establish a prima
4 facie case “is minimal and does not even rise to the level of a preponderance of the
5 evidence.” Schechner, 686 F.3d at 1025 (citing Wallis v. J.R. Simplot Co., 26 F.3d 885,
6 889 (9th Cir. 1994)).

7 Under this standard, the court finds that plaintiff has arguably met the requirements
8 for establishing a prima facie case. With regard to job performance, it appears from the
9 evidence that plaintiff may have been performing his job adequately – but that his
10 performance was determined to be less adequate than that of the other department leads.
11 OSH contends that plaintiff has failed to provide evidence sufficient to show that he was
12 meeting OSH’s legitimate expectations at the time of the layoff. However, this is not a case
13 of termination strictly for performance problems. Rather, it is a case alleging that OSH’s
14 real reason for ranking plaintiff near the bottom of the list of ranked department leads was
15 because of age discrimination.

16 Because neither Allen nor McDougal was involved in the ranking of the department
17 leads, or the decision to terminate plaintiff – or indeed, was in a position to compare
18 plaintiff’s job performance with the job performance of other department leads – their
19 opinions regarding plaintiff’s job performance are irrelevant. The only evaluations that are
20 relevant are those of plaintiff’s supervisors – Hill, former manager Twomey, and assistant
21 managers Hirohama and Himan.

22 Plaintiff has provided no clear evidence to dispute the fact that at the time of the RIF,
23 Hirohama and Himan both believed that he was not meeting expectations regarding
24 customer service, or to dispute Twomey’s and Ruiz’s recollections of plaintiff’s past history
25 of poor customer service skills; and has conceded that he does not know what criteria were
26 used to determine the recipients of the “Employee of the Month” award, and that he has no
27 evidence that his department handled every aspect of commercial sales of electrical
28 products except the “check-out.” Nevertheless, there is also no evidence that plaintiff

1 would have been terminated for performance problems had it not been for the RIF.

2 OSH argues that even if plaintiff can establish a prima facie case, it can easily meet
3 its burden of establishing a legitimate, nondiscriminatory reason for plaintiff's termination –
4 the RIF. A RIF may be a legitimate nondiscriminatory reason for laying off an employee.
5 See Coleman, 232 F.3d at 1282. OSH asserts that it was faced with significantly declining
6 economic conditions, which forced it to conduct a RIF, which it did in a rational and
7 nondiscriminatory manner.

8 OSH asserts that it first conducted a thorough labor review, and concluded that it
9 needed to terminate approximately 241 employees statewide. OSH asked the store
10 managers to rank their employees (department leads and assistant managers), but did not
11 tell the store managers in advance about the planned RIF. Once the evaluations were
12 complete, OSH informed the store managers that they needed to terminate the lowest-
13 ranked employees. At the Mountain View store, that meant terminating two department
14 leads and one assistant manager.

15 OSH contends that statewide, 52 of the employees affected by the RIF were under
16 the age of 40. While it is true that plaintiff was the oldest employee at the Mountain View
17 store, it is also true that a majority of the department leads who were ranked higher than
18 plaintiff were also significantly over the age of 40.

19 The court finds that OSH has met its burden of articulating a legitimate, non-
20 discriminatory business reason for plaintiff's termination. Accordingly, the burden shifts
21 back to plaintiff to provide admissible evidence sufficient to create a triable issue as to
22 whether OSH's non-discriminatory explanation is pretext for discrimination.

23 To meet this burden, plaintiff may offer evidence, direct or circumstantial, "that a
24 discriminatory motive more likely motivated" OSH to terminate him. See Burdine, 450 U.S.
25 at 256. Alternatively, he may offer evidence that OSH's "proffered explanation is unworthy
26 of credence." Id. Nevertheless, he cannot defeat OSH's motion merely by denying the
27 credibility of its proffered reason for the RIF or the termination, or by relying solely on a
28 subjective belief that his termination was unnecessary or unwarranted. See Cornwell v.

1 Electra Central Credit Union, 439 F.3d 1018, 1028 n.6 (9th Cir. 2006).

2 Here, plaintiff argues that OSH's articulated reason (its business need to downsize)
3 is "insufficient," because the fact that an employer is free to consolidate or reduce its
4 workforce, and to eliminate positions in the process, does not mean that it can "use the
5 occasion as a convenient opportunity to get rid of its [older] workers." See Guz, 24 Cal. 4th
6 at 35. However, he provides no evidence sufficient to raise a triable issue with regard to
7 whether OSH in fact used the RIF as an opportunity to get rid of its older workers.

8 Instead, he again points to the fact that he received the "Employee of the Month"
9 award and the fact that the Electrical Department was highly profitable, and argues that this
10 shows that he was performing his job satisfactorily – and suggests that OSH's articulated
11 reason must therefore be pretextual.

12 Plaintiff also disputes the significance of the rankings performed by Hill, and OSH's
13 claim that no one (including store managers and assistant managers) knew in advance that
14 the rankings were going to be used in the subsequent RIF, on the basis that one of the
15 factors considered was "potential for advancement." He asserts that nobody would
16 consider a 77-year-old as having potential for advancement because of the "obvious"
17 expectation that he would retire in two or three years. He claims that department leads
18 were not rated on current performance, but on future potential, which he argues is "age
19 discrimination." However, he provides no evidence to support these assertions.

20 With regard to OSH's assertion that the RIF affected approximately 241 employees
21 across California, 52 of whom were under the age of 40, plaintiff responds that these
22 figures are deceptive, because more than 78% of the employees who were laid off were
23 over 40, only 15 of the laid-off employees were under 30, and only 111 were under 50.
24 According to plaintiff, that means that 129 of the 240 laid-off employees were over 50, or
25 53%. Plaintiff contends that this shows that OSH was "demonstrably" getting rid of older
26 employees – that is, those with the most experience, who worked for higher wages, and
27 who were more likely to suffer industrial injuries.

28 The court finds that the motion must be GRANTED. While the court has assumed

1 for the sake argument that plaintiff can establish a prima facie case, it is clear that he does
2 not have evidence sufficient to rebut OSH's legitimate, non-discriminatory business reason
3 for terminating him, or to raise a triable issue as to whether the articulated reason for the
4 termination was a pretext for discrimination.

5 As an initial matter, plaintiff has provided no authority in support of his claim that
6 OSH's decision to conduct a RIF is an insufficient or a non-legitimate reason for the layoffs.
7 Indeed, courts have held that a layoff pursuant to a RIF can be a sufficient legitimate
8 reason for a defendant to prevail in disposing of a discrimination claim. See Martin v.
9 Lockheed Missiles & Space Co., Inc., 29 Cal. App. 4th 1718, 1733 (1994); Guz, 24 Cal. 4th
10 at 357-58.

11 As for evidence of pretext, the Ninth Circuit has held numerous times that where
12 there is no direct evidence of discriminatory motive, evidence of pretext must be "specific"
13 and "substantial" in order to create a triable issue as to whether the employer's non-
14 discriminatory explanation is a pretext for discrimination. See, e.g., Godwin v. Hunt
15 Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998); see also Bodett v. CoxCom, Inc., 366
16 F.3d 736, 743 (9th Cir. 2004). In this case, plaintiff has failed to provide "specific" and
17 "substantial" evidence of pretext.

18 Keith, Hill, Hirohama, and Himan all assert in their declarations that plaintiff's age
19 was not a factor in determining to conduct the RIF, in determining plaintiff's ranking, or in
20 the decision to terminate plaintiff's employment, and plaintiff has no evidence to counter
21 those assertions. In addition, plaintiff has provided no evidence that he should not have
22 been ranked as low as he was, compared to the other department leads.

23 The statistics cited by plaintiff are not sufficient to create a triable issue as to
24 whether OSH's articulated reason for plaintiff's termination was a pretext for discrimination.
25 To raise a triable issue of fact regarding pretext, statistics "must show a stark pattern of
26 discrimination unexplainable on grounds other than age." Coleman, 232 F.3d at 1283. In
27 addition, statistical analysis must factor in other variables. Pottenger, 329 F.3d at 748.
28 Here, however, while plaintiff's analysis purports to show that more than half of the laid-off

1 workers were over 50 years of age, he provides no information regarding, for example, the
2 ages of all the employees working at OSH as assistant managers or department leads. If a
3 majority of those workers were over the age of 50, it would not be surprising that a majority
4 of the workers who were laid off were also over the age of 50.

5 Plaintiff's subjective assumptions regarding how the purpose of the rankings request
6 was interpreted are irrelevant. There is no evidence that the request to the store managers
7 to rank the employees was interpreted as seeking an evaluation of "potential for
8 advancement," or that, as plaintiff claims, "nobody would consider a 77 year old as having
9 potential for advancement."

10 Moreover, Hill testified that he had no idea why he was being asked to rank his
11 department leads, as that was the first time such a request had been made of him, and that
12 he was not informed that a RIF was in the offing until the evaluations were complete. Based
13 on the evidence presented, the court finds it highly unlikely that OSH, which hired plaintiff
14 when he was more than 70 years old, and promoted him into the position of department
15 lead three years later, would have then terminated him based on his age.

16 Nor does plaintiff's receipt of the "Employee of the Month" award establish pretext,
17 because plaintiff has provided no evidence to counter Hill's explanation as to why he
18 decided to name plaintiff Employee of the Month. Similarly, the ranking of the Electrical
19 Department does not establish pretext, as it does not establish that plaintiff's job
20 performance was meeting expectations.

21 Finally, with regard to the EEOC Letter of Determination, the court notes that while a
22 Letter of Determination may be admissible as evidence of discrimination or retaliation, it is
23 not a "free pass through summary judgment." Mondero v. Salt River Project, 400 F.3d
24 1207, 12125 (9th Cir. 2005).

25 For example, in Coleman, the Ninth Circuit found that the EEOC letter at issue did
26 not address what facts the EEOC considered and how it analyzed them, and held that
27 when an EEOC letter reports only "bare conclusions," it has little probative value and
28 cannot by itself create a genuine issue of material fact. Id. 232 F.3d at 1284. Here, the

1 EEOC Determination Letter does not create any genuine issue of material fact, as it
2 contains little detail of the specific facts that led the investigator to conclude that plaintiff
3 had been a victim of age discrimination.

4 **CONCLUSION**

5 In accordance with the foregoing, the court finds that defendant's motion for
6 summary judgment as to the first and second causes of action must be GRANTED. To
7 the extent that the court relied on any evidence to which any party has objected, the
8 objections are overruled.

9 This order does not terminate the case, as there is one cause of action remaining for
10 which OSH did not seek summary judgment – a claim of failure to prevent discrimination,
11 under Cal. Gov't Code § 12940(k). No later than April 5, 2013, OSH shall file a motion for
12 summary adjudication of that issue, not to exceed five pages. Any opposition, also not to
13 exceed five pages, shall be due no later than April 19, 2013. No reply is required, and the
14 court will rule on the papers.

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16 **IT IS SO ORDERED.**

17 Dated: March 29, 2013



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19 PHYLLIS J. HAMILTON
20 United States District Judge
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